Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

No. 96-370

In The

Supreme Court of the United States

October Term, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,

Petitioner,

vs.

FERBAR CORPORATION OF CALIFORNIA, INC., STEPHEN J. BARNES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

Ferbar Corporation has no parent companies or nonwholly owned subsidiaries.

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Petitioner, a multiemployer trust fund, asks this Court to issue a writ of certiorari to review the Ninth Circuit's *per curiam* opinion in this case. The Court should decline because (a) resolving the conflict between the Ninth Circuit and the other circuits will not change the outcome in this case and the split between the Seventh and Third Circuits was not addressed by the courts below; (b) Petitioner seeks review of an issue that is largely moot with regard to the functioning of multiemployer pension plans nationwide; and (c) so long as the trustees comply with their fiduciary duty, the question presented should never arise.

OPINION BELOW

Respondents concur with Petitioner's statement concerning the opinion below.

STATEMENT OFJURISDICTION

Respondents concur with Petitioner's statement concerning the Court's jurisdiction.

STATUTES INVOLVED

In addition to the sections of the Multiemployer Pension Plan Amendments Act (MPPAA) cited by Petitioner, the following sections are relevant to the Court's decision:

> **§ 1001a Additional Congressional findings and declarations of policy**
>
> **(a) Effects of multiemployer pension plans**
>
> The Congress finds that —

* * *

(4)(A) withdrawals of contributing employers from pension plans frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants, and beneficiaries, and labor management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in paragraph (A) are exacerbated.

29 U.S.C. § 1001a.

§ 1104 Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

29 U.S.C. § 1104.

STATEMENT OF THE CASE

A. Statutory Scheme

As the Court has repeatedly explained, first in *Pension Benefit Guaranty Corporation v. Gray*, 467 U.S. 717 (1984), then in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986), then again in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and yet again in *Milwaukee Brewery Workers' Pension Plan v. Schlitz Brewing Co.*, 115 S. Ct. 981 (1995), the MPPAA was passed both to deter employers from withdrawing from multiemployer pension plans, and to protect the plans when they do. As Justice Breyer aptly explained in a unanimous decision early last year:

> MPPAA helps solve a problem that became apparent after Congress enacted the Employee Retirement Income Security Act of 1974. ERISA helped assure private sector workers that they would receive the pensions that their employers had promised them. To do so, among other things, ERISA required employers to make contributions that would produce pension-plan assets

sufficient to meet future vested pension liabilities; . . . and, if a plan became insolvent, it held any employer who had withdrawn from the plan during the previous five years liable for a fair share of the plan's underfunding.

Unfortunately, this scheme encouraged an employer to withdraw from a financially shaky plan and risk paying its share if the plan later became insolvent, rather than to remain and (if others withdrew) risk having to bear alone the entire cost of keeping a shaky plan afloat, Consequently, a plan's financial troubles could trigger a stampede for the exit door, thereby ensuring the plan's demise. MPPAA helped eliminate this problem by changing the strategic considerations. It transformed what was only a risk (that a withdrawing employer would have to pay a fair share of underfunding) into a certainty. That is to say, it imposed a withdrawal charge on all employers withdrawing from an unfunded plan (whether or not the plan later became insolvent). And, it set forth a detailed set of rules for determining, and collecting, that charge.

Schlitz Brewing Co., 115 S. Ct. at 985 (citations omitted).

Thus, the problem prior to the MPPAA was employer withdrawals from multiemployer plans. That Congress considered these withdrawals harmful to pension plans is clear beyond cavil. 29 U.S.C. § 1001a(a)(4)(A) states:

> Withdrawals of contributing employers from pension plans frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants, and beneficiaries, and labor management relations. . . .

To cure this harm, Congress passed the MPPAA which requires a withdrawing employer to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation. *Connolly*, 475 U.S. at 216. Thus, under the MPPAA, "if an employer withdraws from a multiemployer plan, it incurs withdrawal liability in the form of a fixed and certain debt to the pension plan." *Concrete Pipe*, 508 U.S. at 609. The scheme for determining and collecting this debt is, for current purposes, adequately set out in Petitioner's brief. (Pet. Brief at 2-3).

B. Facts

For the past six years, Respondent Ferbar Corporation has been an out-of-business laundry and Respondent Stephen Barnes has been its sole shareholder (collectively "Ferbar" or "Respondents"). However, at the time of the circumstances initially giving rise to this suit — some eleven years ago — Ferbar operated two laundries, Superior French Laundry and One Hour Martinizing. (Pet. App. at 7a). In March of 1985, the employees of these laundries decided they no longer wanted to be represented by a union, and Ferbar withdrew recognition and stopped making contributions to a local pension plan (Pet. App. at 7a; Amended Agreement and Declaration of Trust at 1, 4), Petitioner Bay Area Laundry and Dry Cleaning Trust Fund ("Petitioner" or "the Fund").[1] Despite its statutory obligation

1. The Bay Area referred to is the San Francisco Bay Area.

to then calculate the employer's withdrawal liability and demand payment "as soon as practicable," 29 U.S.C. § 1399(b), the Fund did nothing for almost two years.

On December 12, 1986, the Fund finally sent a notice to Superior French Laundry claiming a $45,580.80 withdrawal liability obligation, as well as a payment schedule requesting the first quarterly installment by February 1, 1987. (Pet. App. at 7a). Ferbar did not pay, and the Fund did nothing. On February 27, 1987, Ferbar requested a review of the Fund's assessment. (Pet. App. at 7a). The Fund did not respond. (Defendants' Motion For Attorney's Fees at 2). On April 14, 1987, the Fund notified Ferbar it was delinquent and that it would be considered in default if it did not pay within 60 days. (Pet. App. at 7a). On April 28, 1987, Ferbar answered, referring to its previous response and asking when an answer would be forthcoming. (Defendants' Motion for Attorney's Fees at 2-3). On July 8, 1987, after not hearing from the Fund on the assessment issue, Ferbar requested arbitration. (Defendants' Motion for Attorney's Fees at 3). The Fund did not respond. (Defendants' Motion for Attorney's Fees at 3). After that, Ferbar eventually went out of business and Respondent Barnes got on with his life. (Defendants' Motion for Attorney's Fees at 2). Out of the blue, on February 9, 1993 — six years and eight days after the initial payment was due, and almost eight years after Ferbar withdrew from the pension plan — the Fund filed the present lawsuit. (Pet. App. at 7a; Defendant's Motion for Attorney's Fees at 3).

C. Proceedings

The District Court granted summary judgment in favor of Ferbar on this $45,000 claim. The Fund then appealed and the Ninth Circuit affirmed the district court. The Fund then moved for rehearing and rehearing *en banc*, which the Ninth Circuit

denied. The District Court and Court of Appeals opinions can be found in the Petitioner's Brief at Appendices A through C. The cases speak for themselves and Respondent will not reiterate them here.

This brings us to today. The Fund has aggressively litigated this $45,000 case through every step of the expensive appellate process. (Respondents' attorney's fees, up to the summary judgment motion alone, were $12,962.50 — which counsel reduced to $ 5,920 because Ferbar was inactive and Barnes a man of limited means. (Defendants' Motion for Attorney's Fees at 7)). Any hearing before the Supreme Court would be prohibitively expensive for Respondents.

REASONS FOR DENYING THE WRIT

I.

A CONFLICT BETWEEN THE CIRCUITS IS NOT, IN AND OF ITSELF, REASON TO ISSUE A WRIT OF CERTIORARI.

Respondents concede there is an apparent conflict in the circuits on the question presented. However, the conflict (which Petitioner overstates) is academic, with no real practical importance. Large multiemployer pension plans — as well as small ones like Petitioner, which operate in just one circuit — can certainly live with the conflict. After all, conflicts between the circuits are ubiquitous. What really matters is whether the issue to be addressed is "important." Supreme Court Rule 10(a). That is where this petition fails.

A. Resolving The Conflict Between The Ninth Circuit And The Other Circuits Will Not Affect The Outcome In This Case.

The broad conflict between the circuits is this. The Ninth Circuit believes a cause of action for withdrawal liability arises when an employer withdraws. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 73 F.3d 971 (9th Cir. 1996) (*per curiam*). Three other circuits believe a cause of action arises when the employer's first payment becomes overdue. *Board of Trustees Of The Dist. No. 15 Machinists Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852, 859 (3d Cir. 1994); *Central States Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989).[2] This conflict makes no difference in the present case, for Respondents win both ways. The suit was filed more than six years after its first payment was overdue, and Respondents withdrew almost two years prior to that. The Supreme Court, which is not in the business of issuing advisory opinions, *Laird v. Tatum*, 408 U.S. 1 (1972), should not take a case to resolve an issue that would not affect the judgment of the court below.

B. The Conflict Between The Seventh And Third Circuits Will Rarely Arise, And Should Not Be Resolved Through A Ninth Circuit Case Which Did Not Address The Issue.

The narrower issue Petitioner wants the Court to reach — whether a separate limitations period exists for each withdrawal liability installment payment — has only been

2. Contrary to Petitioner's representations, *Giroux Bros. Trans., Inc. v. New England Teamsters & Trucking Indust. Pension Fund*, 73 F.3d 1 (1st Cir. 1996), does not address the issue.

addressed by the Seventh and Third Circuits. The Seventh Circuit believes the limitations period on the entire claim runs from the time the first payment is overdue. *Navco*, 3 F.3d at 172. The Third Circuit thinks not, holding that if an installment payment plan is used, each installment has its own six year limitations period. *Board of Trustees Of The Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852, 859 (3d Cir. 1994). Under the Seventh Circuit's interpretation, Respondents win again. Only if the Court adopts wholesale the Third Circuit's approach will Respondents lose — and then only partially.

As an initial matter, the Court need not resolve this conflict because it will rarely, if ever, arise. As the Seventh Circuit stated in *Navco*:

> Congress told the trustees of pension funds *not to tarry* in assessing and collecting liability. The fund shall compute liability and demand payment as soon as practical after an employer's complete or partial withdrawal.

Id. at 173. Only those trustees which wait more than six years to file suit after assessing, scheduling, and demanding payment will miss the deadline. And given Congress's express declaration that trustees not tarry in collecting payment, trustees should not wait that long.

Furthermore, although resolution of the Seventh/Third Circuit split could conceivably alter the judgment in favor of Respondents, that alone is not enough to grant a writ of certiorari. This defunct employer should not bear the burden of resolving a conflict between two circuits which have no obvious jurisdiction over either the Petitioner or Respondents,

especially when the issue giving rise to the conflict was never addressed in the courts below.

II.

BECAUSE THE MAJORITY OF MULTI-EMPLOYER PENSION FUNDS ARE FULLY FUNDED, THE QUESTION PETITIONER WANTS ADDRESSED WILL RARELY ARISE.

Another reason for denying the petition is that withdrawal liability in general is no longer a pressing issue.

As noted previously, the purpose of withdrawal liability is to make sure employees receive their vested benefits. It does so by requiring a withdrawing employer to pay "its proportionate share of the plan's unfunded vested benefits." *Concrete Pipe*, 508 U.S. at 609. Determining the extent to which vested benefits are "unfunded" is easy enough: an actuary calculates the present value of the vested benefits and subtracts the value of the plan's assets. The difference is "unfunded." *Id.* at 610. Obviously, if the plan's assets exceed the present value of the vested benefits, then there are no unfunded vested benefits, and, consequently, no withdrawal liability. *Id.* (noting that employer's withdrawal liability is a proportion of the *unfunded* vested liability); 29 U.S.C. § 1391(b)(1). That is the current situation with most multiemployer pension plans.

A 1995 survey, published by The Segal Company, of 475 multiemployer pension plans shows that 65% of plans are 100% funded, 82% of plans are at least 90% funded, and 93% of plans are at least 80% funded. THE SEGAL COMPANY, SURVEY OF THE FUNDED POSITION OF MULTIEMPLOYER PLANS 4 (1995). And the average ratio of assets to vested benefits is 95%. *Id.* The survey concludes that "multiemployer plans continue to be well-

funded and continue to have, on average, a high funded ratio." *Id.* at 10.

In most cases, then, an employer withdrawing from a multiemployer plan will have *no* withdrawal liability, and no statute of limitations issue (or any other issue) will arise. As for those plans that are not fully funded, the unfunded portion is likely to be small; an employer's potential withdrawal liability will of course be smaller; and the number of instances where the statute of limitations issue will arise given its six year length will be smaller still. The need to utilize this Court's resources to resolve this minor issue diminishes correspondingly.

III.

THE FIDUCIARY DUTY TO EXPEDITIOUSLY DEMAND AND COLLECT WITHDRAWAL LIABILITY RENDERS THE LATER COMMENCEMENT OF THE STATUTE OF LIMITATIONS OF LITTLE PRACTICAL EFFECT.

Finally, Petitioner makes much of the fact that other sections of ERISA and the MPPAA encourage the trustee to act quickly in determining and collecting withdrawal liability. This fact alone is sufficient reason to deny the petition.

Regardless of when a cause of action arises in withdrawal liability cases, a trust fund has at least six years — 72 months — to bring suit. 29 U.S.C. § 1451(f). This is, as the Seventh Circuit noted, more than generous. *Navco*, 3 F.3d at 171. It is also unnecessary. In no case will a cause of action arise until the trust learns of the withdrawal. 29 U.S.C. § 1451(f)(2). After that, a fund must assess, schedule, and demand payment "as soon as practicable." 29 U.S.C. § 1399(b)(1). In *Schlitz Brewing Co.*, the Court noted this could take as little as a day. *Id.*

at 987. The Seventh Circuit noted that it should be done in a matter of weeks. *Navco*, 3 F.3d at 171. No later than sixty days after the demand (but certainly earlier), whenever the employer's first payment becomes overdue, the trust fund may bring suit. *Id.*, 29 U.S.C. § 1399(c)(2).

Assume, conservatively, that after withdrawal it takes an entire month for a trust fund to calculate the withdrawal liability and demand payment. Assume also that the fund gives the employer a full two months to make, and miss, its first payment. The difference between the withdrawal and the time of the first payment is at most three months. Under this scenario, in the Ninth Circuit — where the cause of action arises upon withdrawal — the fund still has 69 months after the missed payment to file suit. In the other circuits cited by Petitioner — where the cause of action arises when the first payment is overdue — the fund has 72 months. With a six year limitations period, this three month difference is negligible. Any trustee that cannot find time to file a boilerplate complaint either 69 or 72 months after a cause of action arises should not be managing a multiemployer pension fund. Petitioner's argument that the statute of limitations should run from a later starting point only results in allowing a trustee even longer to commence the action. If it waits so long to act, however, it will further open itself to charges that it has breached its fiduciary duty. Given this fact, it is unlikely that any trustee would avail itself of the extra time.

In short, trustees have a fiduciary duty to collect, when possible, withdrawal liability from employers. 29 U.S.C. § 1104. Waiting around more than six years to do so potentially violates that duty, for, as in the present case, the employer might not be around that long. Furthermore, failing to collect withdrawal liability in a timely manner exasperates the very harm the MPPAA was meant to cure: The remaining employers

are forced to keep an underfunded plan afloat while the trustee sits on its hands. No trustee worth its salt will violate its fiduciary duty in this way. Thus the statute of limitations issue Petitioner eagerly wants addressed should rarely arise.

For much the same reason, the narrow split between the Seventh and Third Circuits has no practical importance. As the Seventh Circuit noted:

> Statutes of Limitations serve vital societal interests — the usual ones of preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities, and in the MPPAA the unusual one of protecting the beneficiaries of the fund. Congress told the trustees of pension funds *not to tarry* in assessing and collecting liability. The fund shall compute liability and demand payment as soon as practical after an employer's complete or partial withdrawal.
>
> * * *
>
> [W]e believe that it would be imprudent to adopt a rule that relieves the pressure on trustees of pension funds to act with dispatch. Six years is quite sufficient; the trustees may not award themselves more.

Navco, 3 F.3d at 173 (citations omitted). Though the Third Circuit holds that each installment payment has a separate statute of limitations, *Kahle*, 43 F.3d at 861, this is not a holding upon which any responsible fiduciary would rely. Even if, twenty-six years out, a fiduciary could bring a cause of action

for withdrawal liability, fiduciaries concerned with their duties under 29 U.S.C. § 1104 would never prudently wait that long.

Accordingly, the question presented by petitioner is an academic one. Responsible fiduciaries, regardless of when the cause of action arises, will always act well before the six year statute of limitations runs.

IV.

THE NINTH CIRCUIT'S OPINION IN THE PRESENT CASE IS CORRECT.

Though the Court has no reason to consider the issues raised in these lower court decisions, it should know that the Ninth Circuit's position — that the cause of action arises upon withdrawal — is correct.

Generally, a cause of action accrues, or "arises," when there is a harm. As the D.C. Circuit noted, an action may be brought against an employer under 29 U.S.C. § 1451(a) when a plan has been "adversely affected by the act or omission of any party under this subtitle." *Joyce*, 871 F.2d at 1122. This, unfortunately, begs the question of what act adversely affects a plan. However, the specific language of the MPPAA, as well as its purpose, make clear that the act which adversely affects the plan is the employer's withdrawal.

With regard to the statutory language, Congress specifically found that "*withdrawals of contributing employers* from pension plans frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, *adversely affecting the plan*, its participants, and beneficiaries, and labor management relations." 29 U.S.C. § 1001a(a)(4)(A) (emphasis added). The same phrase

("adversely affecting" and "adversely affected") appears in both § 1001a and § 1451. Section 1001a clarifies, by implication, what act or omission causes the harm and thus gives rise to the cause of action: namely, the employer's withdrawal. It results in a decrease in the contributions to the fund and a heavier burden on the remaining employers.

This understanding is buttressed by the MPPAA as a whole. As stated time and time again by this Court, the MPPAA was passed to alleviate the harm caused by employer withdrawals from pension plans. *Schlitz Brewing Co.*, 115 S. Ct. at 985. How can this obvious harm — the purpose of the statute — not give rise to a cause of action on behalf of the plan, its beneficiaries, or the remaining employers?

CONCLUSION

In recent years, this Court has spent a great deal of time addressing issues arising under the MPPAA. *Infra* at 3. Fortunately, it can now rest (for a time at least) from its work on this statute: Most multiemployer pension plans are fully funded, issues concerning withdrawal liability are no longer pressing, and they need not command the Court's attention. The question presented in this case, in particular, is unworthy. The conflict Petitioner hopes to resolve should simply not be an issue. A statute of limitations longer than six years is only important to dilatory trustees, and there are few of those. So long as trustees compiy with their ERISA-imposed fiduciary duties, they will never miss the overly generous six year statute of limitations allowed by Congress.

Respectfully submitted,

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